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No. 633

# In the Supreme Court of the United States

OCTOBER TERM, 1943

ROBERT NORTH, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT*

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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### OPINION BELOW

The opinion of the circuit court of appeals (R. 1726–1730) is not yet reported.

### JURISDICTION

The judgment of the circuit court of appeals was entered December 29, 1943 (R. 1744), after a petition for rehearing (R. 1731–1736) had been denied on December 28, 1943 (R. 1742–1743). The petition for a writ of certiorari was filed January 26, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial

Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

The question involved is whether the prosecution of petitioner was barred by the statute of limitations. The resolution of this question depends upon the determination whether the evidence is sufficient to support the jury's finding that petitioner did not affirmatively withdraw from the fraudulent scheme and conspiracy more than three years prior to the filing of the indictment.

STATUTE INVOLVED

R. S. 1044, as amended, 18 U. S. C. 582, provides:

> No person shall be prosecuted, tried, or punished for any offense, not capital, * * * unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed.

STATEMENT

On February 20, 1939, petitioner and others were indicted in the District Court of the United States for the Southern District of New York in twelve counts (R. 3–22), eleven of which charged them with having used the mails in execution of

a scheme to defraud in connection with the sale of certificates of the Royalty Investment Trust, in violation of Section 215 of the Criminal Code (18 U. S. C. 338) (R. 3–20);[1] the twelfth count charged them with conspiring to do the acts alleged in the other counts, in violation of Section 37 of the Criminal Code (18 U. S. C. 88) (R. 20–22).

Petitioner was tried before a jury, which found him guilty on the eleven counts submitted to it (R. 1615).[2] He was sentenced to imprisonment for two years on each count, the sentences to run concurrently (R. 1627). Upon appeal, the Circuit Court of Appeals for the Second Circuit affirmed the conviction (R. 1726–1730) and thereafter denied a petition for rehearing (R. 1742–1743).

The evidence relating to petitioner's contention that the prosecution as to him was barred by the statute of limitations may be summarized as follows[3]:

Beginning in May or June 1935 petitioner was employed as a telephone solicitor by the defendant Bramson (R. 760), who was the dominant figure in the fraudulent scheme (see R. 1726–1727).

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[1] At the close of the Government's case, the court granted a defense motion to dismiss the second count (R. 1287).

[2] The other defendants either pleaded guilty (R. 38–39, 54) or were convicted at the trial (R. 1614–1616).

[3] The details of the scheme as charged in the indictment and as shown by the evidence at the trial are briefly summarized in the opinion of the circuit court of appeals (R. 1726–1727).

Petitioner's duties consisted of soliciting new brokerage accounts for the B. W. Bunker Co.[4] (R. 221–222), in "trying to convert them [customers] or to sell them more" (R. 765), and in "servicing accounts" (R. 1487, 1499–1500). On occasion petitioner identified himself to prospective customers as "Mr. Boyd" (R. 249, 764; see *infra*, pp. 6–7) or "Mr. Walker" (see *infra*, p. 7). Petitioner was continuously engaged in these activities at least until December 1935 (R. 764, 829, 1479; see Pet. 3). The evidence concerning petitioner's activities after that time is conflicting. The defendant Reeves, who pleaded guilty and was called as a witness for the Government (R. 39, 756), testified on direct examination that in the third or fourth week of February 1936 he had a conversation with petitioner, as follows[5]:

> The WITNESS: I asked him if he was not still at 170 Broadway where Mr. Bramson had a telephone room.

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[4] B. W. Bunker Company was the front office through which the scheme was operated (R. 217, 406–408, 656, 658, 758). Petitioner and his co-defendants worked in "boiler rooms" (R. 661), which were rooms equipped with numerous telephones so that several salesmen could work at the same time (R. 1495).

[5] In fixing the time of the conversation Reeves testified that it occurred at the time he had been requested to vacate one of the telephone rooms at 120 Wall Street (R. 822–823). That request came three weeks after he had signed the lease for the premises (R. 823). The lease was signed in the last week in January or the first week in February 1936 (R. 823, 783).

Q. What did he say? A. Told me he was getting through with Mr. Bramson, that he couldn't get along with him, and he says, "I saw you coming out of 120 Wall Street," so I said, "Yes". So he said, "That proposition was offered to me." I said, "What proposition?" He said, "You know what you are doing." I said, "No." He said, "Watch yourself. Mr. Bramson will put you in the middle."

Q. Did you have any further discussion with Mr. North? A. He merely stated that he was winding up or getting through with Mr. Bramson. (R. 791.)

On cross-examination by petitioner's counsel, Reeves testified:

Q. Did he tell you at that time he had been finished with Bramson and Bunker? A. No, sir. He said he was getting through with him. (R. 824.)

And on redirect examination, he testified:

Q. Just what was the entire conversation when you met Mr. North taking the shine, so we can clear that up? A. He said to me that he was offered that proposition, referring to the Carey business * * *

A. (Continuing) He asked me—he says, "How are you doing? How are you?" Something along those lines; greetings. I said, "I thought you you were at 170 Broadway." He said, "No, I am through or getting through with Mr. Bramson. I don't want to have anything more to do with him." He said, "Watch yourself or Bram-

son will put you in the middle in regard to this Foran account." He said that the proposition was offered to him.

Q. Are you positive he said that he was getting through with Bramson, is that correct? A. Yes, sir. (R. 828–829.)

Government witness Spiegel[6] testified that in December 1935 petitioner told him that he was no longer connected with Bramson or Bunker (R. 246); that in the latter part of December 1935 he overheard petitioner call a Mr. Johnston and a Mr. Holub and, after identifying himself as Mr. Boyd, petitioner told them that "he had quit B. W. Bunker Company" and advised them to close their accounts with Bunker Company (R. 254–256, 252); and that in November or December 1935 he obtained a job for petitioner with another brokerage house (R. 243–244). Johnston testified, however, that in the spring of 1935 he was solicited by a "Mr. Boyd" and urged to buy stocks from him (R. 273); that throughout 1935 he bought and sold considerable amounts of stocks and securities through "Boyd," including Royal Investment Trust certificates (R. 273–276, 278–279); and that at no time did he ever receive a message from "Boyd" to the effect that he was no longer connected with Bunker and Company (R. 288, 285). Similarly, Holub testified that

[6] Spiegel apparently was named as a defendant in a companion indictment as to which a severance was granted at the opening of the trial (see R. 40, 53, 215).

after several telephone solicitations by a "Mr. Boyd," he bought stocks through him; that a few months later, he sought to have his account transferred to his regular broker; and that he did not do this at the suggestion of anyone (R. 895–896). The defendants Wolfson and Goldman [7] testified that in December 1935 petitioner told them that he was leaving the employ of Bramson and the Bunker Company (R. 438, 1479), and the defendant MacKnight [8] testified that petitioner told him in December 1935 that "he had severed his connections" with Bramson (R. 659–660).

Petitioner did not take the stand. For his defense he relied on the testimony of the witness Manna Mangle. She testified that in August 1935 she opened an account with Bunker and Company pursuant to a telephone solicitation from a "Mr. Walker" (R. 1527, 1529, 1516); that she consummated several transactions over the telephone with "Walker" (R. 1516, 1528–1529); that "in the latter part of December or the first part of January", "Walker" called her and said that things were not " 'according to Hoyle' with B. W. Bunker & Company, and he was severing his connection with them, and he thought I would be

[7] Wolfson pleaded guilty (R. 38) and was called as a witness by the Government (R. 403). Goldman testified in his own defense (R. 1473).

[8] MacKnight pleaded guilty (R. 38) and testified as a government witness (R. 651).

wise to take out my securities" (R. 1517); that on January 17, 1936, she met "Walker" for the first time and learned that he was in fact the petitioner North (R. 1518–1519); that at the time he stated that he was no longer with B. W. Bunker Company (R. 1519); that on February 11, 1936, her account was transferred from the Bunker Company (R. 1520); and that in 1936 she saw or talked to petitioner some 50 times (R. 1529–1530) and that when she saw him in person it was to "have tea and discuss business" (R. 1526).

ARGUMENT

1. Petitioner does not dispute the fact that, as charged in the indictment (R. 3), the fraudulent scheme and conspiracy was a continuing one,[9] nor does he deny that he had an active part in it. Instead, he contends (Pet. 4, 9–14, 16–18) that he withdrew from the fraudulent scheme and conspiracy more than three years prior to the filing of the indictment.

Having joined in an unlawful scheme and conspiracy, petitioner may not now assert the statute of limitations as a bar to his prosecution unless prior to February 20, 1936, he took "affirmative action" "to disavow or defeat the purpose" of

[9] The indictment charged that the scheme and conspiracy continued from January 1, 1934, to the date of the filing of the indictment (R. 3, 20), i. e., February 20, 1939 (R. 33).

the scheme and conspiracy. *Hyde* v. *United States*, 225 U. S. 347, 369.[10]

Contrary to petitioner's assertion that the testimony of Spiegel, MacKnight, and Wolfson "revealed that the petitioner had completely disassociated himself from Bramson & Bunker" (Pet. 10), that testimony, viewed in the light most

[10] Similarly to petitioner, the defendant Schneider in the *Hyde* case asserted the statute of limitations as a bar, claiming that he had effected a timely withdrawal from the conspiracy. The evidence showed that before all of the overt acts alleged in the indictment occurred Schneider revealed the conspiracy to a government agent. With respect to this revelation the trial court instructed the jury:

"Now if he [Schneider] had stood by that and had gone on and disclosed all he knew about the matter, and said: 'I will have nothing more to do with this matter,' nothing that could have been done by the others after that could affect him at all. He would have been out of it; he would have repudiated it. As bearing on the effect of what he did there if you find he did it, you are to consider what he did afterwards. If, after having made this disclosure as far as he did, he shut his mouth and said: 'I will not say anything more about this matter; the Government shall not get anything more out of me,' that is not an act by him in furtherance of the conspiracy, but it is a piece of evidence to be considered by you as bearing on the question whether he was acquiescent—what his attitude of mind toward the conspiracy was.

"If he had stood on his disclosure, you might have said: 'Well, he is out of it from now on'—but in connection with that you are to consider what he said afterwards. If you find that he closed his mouth and refused to say anything more about the matter and kept still in the interest of the others, you would have a right to say that that showed that he was still acquiescent in the matter. It would neutralize, if you choose to treat it so, the effect of his former declaration, that he did know, and was willing to disclose."

favorable to petitioner, shows only that in December 1935 petitioner either had ceased or was going to cease soliciting new accounts and servicing old ones for Bramson and that he secured employment with another brokerage office (see *supra*, pp. 6–7). The testimony of Reeves showed that in the third or fourth week of February 1936, at least two months after petitioner supposedly had been working in his new job, petitioner told him he was "getting through" with Bramson. Reeves specifically denied on cross-examination by petitioner's counsel that petitioner told him he was "finished" with Bramson and Bunker (*supra*, p. 5). Similarly, petitioner's claim (Pet. 6, 10) that "his only known customer" was Mangle and that when he advised her to withdraw her account from Bunker and Company he did everything that was legally required of him to effectuate a complete withdrawal from the scheme must fall with the premise upon which it was based. The witnesses Johnston and Holub were identified by the defendant Spiegel as customers with whom petitioner dealt while using the name of Boyd.

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This Court treated the instruction as submitting to the jury "the effect of the repudiation, and whether it was adhered to, as evidence of Schneider's further participation in the conspiracy by the overt acts done subsequent to the date of his disclosure." 225 U. S. at 370–372. See also *United States* v. *Beck*, 118 F. (2d) 178 (C. C. A. 7), certiorari denied, 313 U. S. 587; *Deacon* v. *United States*, 124 F. (2d) 352, 358–359 (C. C. A. 1); *Eldredge* v. *United States*, 62 F. (2d) 449 (C. C. A. 10); *United States* v. *Gilbert*, 31 F. Supp. 195, 202 (S. D. Ohio).

Furthermore, it is a reasonable inference that in the six or more months in which petitioner was actively engaged in soliciting new accounts and servicing old accounts (*supra,* pp. 3–4), he acquired many other customers. Yet the only customer to whom he revealed his purported withdrawal from the scheme was the witness Mangle, who, curiously enough, had not been sold any of the Royalty Investment certificates. Johnston, who had purchased the certificates from petitioner, was not so advised, nor was Holub (*supra,* pp. 6–7). It is plain that even if petitioner did not intend actively to seek new accounts, he had no intention of revealing the fraudulent scheme to the people who had been defrauded or to the authorities. Obviously, if petitioner had revealed the fraud, the scheme would necessarily have collapsed. His failure to do so thus contributed directly to the successful continuation of the frauds. In these circumstances the determination of whether petitioner effectively withdrew from the scheme and conspiracy was plainly a question of fact for the jury.[11] Cf. *United States* v. *Beck, supra; Sperry Gyroscope Co.* v. *National Labor Relations Board,* 129 F. (2d) 922, 927–928 (C. C. A. 2). And no sufficient reason appears why the concurrence of the jury, the trial

[11] Petitioner's failure to take the witness stand strongly suggests that he could not give an account of his conduct that would be consistent with his defense that he had withdrawn from the scheme and conspiracy prior to February 20, 1936. Cf. *Local 167* v. *United States,* 291 U. S. 293, 298.

court, and the circuit court of appeals should not be accepted as final. *Delaney* v. *United States*, 263 U. S. 586, 589–590.

Petitioner also contends that "The trial Judge's charge precluded any finding that petitioner remained in the conspiracy after the Statute of Limitations had tolled" (Pet. 16–18, 15). There is no merit in this contention. On the issue of withdrawing from the conspiracy and scheme, the court charged [12]:

> Also a man may withdraw from a conspiracy. That element is present in this case and so it is necessary to discuss it. Assume that three or four men have entered into a conspiracy and one becomes disgusted either with the progress that is being made or the benefits that seem to be looming up, or for any other reason whatever and he desires to withdraw? Now the law says, of course, that he may withdraw, but that does not mean that he can stand idly by and become a kind of a neutral observer. If he has already kindled a fire, he cannot just stand by and watch the fire burn and say, "Oh, I withdrew from it." He has got to take some affirmative step which is inconsistent with his former participation. He has got to do something to arrest the progress of the conspiracy in which he has participated,

[12] Although the quoted language refers only to the conspiracy, the court instructed the jury that it also was applicable to the fraudulent scheme (R. 1568).

in order that the partnership into which he has entered and from which he has withdrawn can no longer constitute an agency of which he is a part (R. 1567–1568).

* * * * *

I tried to cover the question of the defendant North in the early part of the charge. If you find that he withdrew from the scheme and took some affirmative step to destroy or frustrate or interfere with the operations of the scheme, if there was one, during the month of December, 1935, you are at liberty to find that there was no misconduct as alleged in the indictment on his part during the period of three years prior to February, 1939. There is an interval of time which is involved between December, 1935 and February 20, 1936, because the indictment was filed three years after February 20, 1936. (R. 1582.)

At the conclusion of the general charge the court read to the jury various requested instructions, including petitioner's requested instructions thirty-one:

You are instructed that there has been no testimony offered by the government to contradict the evidence submitted in behalf of the defendant, Robert North, that he had terminated his employment by Bunker & Co. during December, 1935 and prior to February 20, 1936.

I so charge. (R. 1589.)

and thirty-four:

> You are instructed that even though a defendant may have been a party to a conspiracy or scheme to defraud, that such defendant may leave the conspiracy or scheme and terminate his connection therewith, and if you find from the evidence that such a defendant has left or abandoned the scheme or conspiracy and has affirmatively acted so as to frustrate or defeat the purpose and object of the scheme to defraud, or the conspiracy, as alleged in the indictment, then he is no longer bound by the subsequent acts of his co-defendants and their subsequent acts are not his acts.
>
> Are you satisfied with it? I am adding: "That if an indictment is found more than three years after the defendant has been shown to have so separated himself and sought to frustrate the scheme or conspiracy, he must be acquitted."
>
> Are you satisfied with that amended form?
>
> Mr. Ohringer: Yes. (R. 1589–1590).

The charge viewed in its entirety makes it clear that the judge intended to and did leave to the jury the fact question whether petitioner had effectively withdrawn from the conspiracy prior to February 20, 1936.

Petitioner bases his contention on the court's adoption of his requested instruction thirty-one. A short answer to this proposition is that the instruction was directed only to the cessation of the employer-employee relationship between pe-

titioner and Bramson; it left for the jury the determination of whether, having terminated his employment, petitioner affirmatively withdrew from the conspiracy.[13] That this is true is manifest from the court's adoption of petitioner's requested instruction thirty-four. That instruction, following immediately after instruction thirty-one, emphasized that a conspirator or schemer may leave or abandon the scheme or conspiracy, but that to avoid legal liability, he must affirmatively act so as to frustrate or defeat it. In these

[13] Moreover, that instruction was erroneous in that it overlooked the testimony of government witness Reeves. The sole "evidence submitted in behalf" of petitioner was the testimony of the witness Mangle (see R. 1560) that in late December or early January petitioner advised her that he had severed his relationship with Bramson (*supra*, pp. 7–8). Reeves testified that in the third or fourth week of February petitioner told him that he was "getting through" with Bramson (*supra*, pp. 5–6). Even if the instruction may be construed as reflecting a rejection by the trial court of Reeve's testimony, as petitioner seems to insist (Pet. 4–5, 15–18), it could not properly have been directed at taking the issue of cessation of employment from the jury, for the credibility of the witness plainly was a matter for the jury's determination. Cf. *Shushan* v. *United States*, 117 F. (2d) 110 (C. C. A. 5), certiorari denied, 313 U. S. 574, rehearing denied, 314 U. S. 706. Additionally, the trial judge, at the outset of his charge, instructed the jury that:

> * * * It is your recollection and understanding of the testimony, gentlemen, which will govern your deliberations and your conclusions, not what counsel may have said about the evidence, which differs from your understanding of the testimony, nor yet what the Court may have said or may say. The testimony is submitted to you in its entirety, and it is for you to decide what it establishes. (R. 1562–1563.)

circumstances it is plain that petitioner's contention is wholly without merit.[14]

## CONCLUSION

The petition presents no question of importance, and no conflict of decisions is involved. We therefore respectfully submit that it should be denied.

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IRVING S. SHAPIRO,
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FEBRUARY 1944.

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[14] Petitioner assigns as error (Pet. 5, 9), but does not argue, the reception of evidence of transactions in the spring of 1936 in connection with the stock of the Wyoga Gas and Oil Company. The evidence was originally brought into the case by one of petitioner's co-defendants while cross-examining the government witness Wells (R. 985–988). Thereafter the Government offered further evidence concerning the stock on the issue of intent and the court received it for that limited purpose (R. 1227–1238). The court below found no error in the reception of the evidence (R. 1729). Since it related to a contemporaneous fraudulent scheme closely connected with the scheme charged in the indictment, it was plainly admissible on the issue of the defendants' intent. *United States* v. *Durbin*, 93 F. (2d) 499, 502 (C. C. A. 2), certiorari denied, 303 U. S. 646; *Johnson* v. *United States*, 82 F. (2d) 500, 504–505 (C. C. A. 6), certiorari denied, 298 U. S. 688; *Little* v. *United States*, 73 F. (2d) 861, 867 (C. C. A. 10).

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